

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BRIDGET M. CURRAN, individually, and as
Natural Guardian of C.F.C., a Minor,

Civ. Action No. 13 CV 0289
(KMK)
(ECF case)

Plaintiffs,

v.

Aetna Life Insurance Company,
TriNet Group, Inc., and
The TriNet Open Access Managed
Choice Plan,

**Plaintiffs' Memorandum In
Opposition To Defendants'
Rule 12 (b) (6) et al
Motions**

Defendants.

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**PLAINTIFFS' STATEMENT REQUESTING COGNIZANCE UNDER
JUDGE KARAS' INDIVIDUAL RULES OF PRACTICE II**

1. By Notice of Motion, dated May 8, 2013, defendants moved to dismiss the subject Complaint under Rule 12 (b) (6) Fed. R. Civ. Proc. For "failure to state a claim upon which relief can be granted". By said motion defendants further moved to strike plaintiffs' jury demand under Fed. R. Civ. Proc. Rules 12 (f) and 39 (a) (2).

2. The subject Complaint was filed in the United States Southern District (White Plains) on January 14, 2013. Pursuant to Rule 4 Fed R. Civ. Proc. defendants waived service of the summons in the action. By letter request to Judge Kenneth M. Karas, dated March 20, 2013, defendants' counsel requested that defendants' time to respond to plaintiffs' Complaint be extended to May 8, 2013.

Plaintiffs' counsel had previously consented to plaintiffs' extension request, which was granted by Endorsement Order of the Court dated March 22, 2013. Defendants' motions to dismiss and to strike were served and filed on May 8, 2013.

3. Plaintiffs submit that defendants' joint motion to dismiss the Complaint and to strike plaintiffs' jury demand conflict with and are contrary to the Individual Rules of Practice of Judge Kenneth M. Karas. Rule II of Judge Karas' Individual Rules of Practice states that a pre-motion conference with the Court is "required" before any party makes a motion before the Court, excepting certain prescribed motions as itemized in Judge Karas' Rule II. Neither defendants' motion to dismiss the Complaint under Rule 12 (b) (6) nor defendants' motion to strike plaintiffs' jury demand under Rule 12 (f) or Rule 39 (a) (2) constitutes a prescribed exception to Judge Karas' requirement for a pre-motion conference with the Court. Accordingly, defendants are required to follow the procedure set out in Judge Karas' Individual Practice Rule II. The subject motions were filed by plaintiffs without plaintiffs having arranged for a pre-motion conference as directed under Judge Karas' Individual Rules of Practice Rule II. Plaintiffs should either withdraw the subject motions on their own initiative; or if not withdrawn by plaintiffs' voluntary action, the subject motions should be dismissed by the Court with leave to follow the procedure set forth in said Individual Practice Rule II

as a condition precedent to the Court's consent for a pre-motion conference.

4. Defendant's Notice of Motion to dismiss plaintiffs' Complaint under Rule 12 (b) (6) Fed. R. Civ. Proc. is made on the basis of the supporting Declaration, dated May 7, 2013, of Robert Gallion, who describes himself as a "Complaint and Appeal Analyst" with defendant Aetna Life Insurance Company. Mr. Gallion annexes a copy of some 213 pages of Aetna's documents which he represents constitute "Aetna's business records in support of Defendants' Motion to Dismiss the Complaint in its entirety with prejudice".

5. Defendants' Notice of Motion to dismiss plaintiffs' Complaint is further made on the basis of the annexed Declaration, dated May 7, 2013, of Helen Hong, corporate Counsel for TriNet Group, Inc. (TriNet). Helen Hong declares that she received, reviewed, and responded to certain correspondence in connection with plaintiffs' claims under the Aetna Plan; Helen Hong annexes to her Declaration "in support of Defendants' Motion to Dismiss the Complaint in its entirety with prejudice" some 43 pages of documentary correspondence.

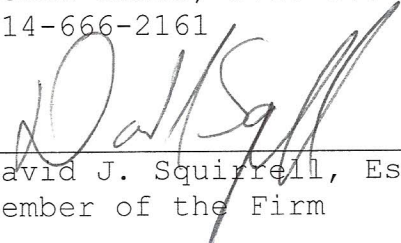
6. Plaintiffs respectfully point out to the Court that Rule 12 (b) (6) Fed. R. Civ. Proc. mandates, on a motion made under Rule 12 (b) (6), that where matters outside the pleadings are presented to and not excluded by the Court, the motion must be treated as one for summary judgment under Rule 56. A fair reading of the papers

submitted by defendants on the subject motions leads one to the conclusion that the subject Rule 12 (b) (6) defendants' motion, is in disguise, a motion for summary judgment, without plaintiffs having had the opportunity for any document or witness discovery and without the filing of defendants' answer to the Complaint.

WHEREFORE, plaintiffs request that defendants' motions be dismissed in their entirety; and that the Court grant other and further relief as the Court deems just and proper.

Dated: May 13, 2013
Mount Kisco, New York

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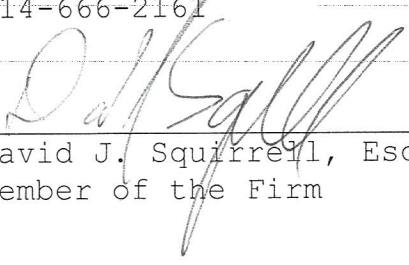
Certificate of Service

I, David J. Squirrell, Esq., hereby certify and affirm that a true and correct copy of **Plaintiff's Memorandum in Opposition** attached was served via ECF on this 13th day of May, 2013, upon the following:

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